NO. 87-819 (3)

JAN 11 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1987

KEELY SMITH

Petitioner

vs.

INTERNATIONAL FUNDING CORPORATION, a California Corporation; MAX D. MARTIN, an Individual; CHARLES E. ELERDING, JR., an Individual; JANET R. ELERDING, an Individual; and T. D. SERVICE COMPANY, a California Corporation

Respondents

On Appeal from the Ninth Circuit Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

		Page
	TABLE OF AUTHORITIES	(ii)
I	THE COURT DOES NOT HAVE JURISDICTION TO GRANT THE WRIT OF CERTIORARI ON THE GROUNDS THAT THE WRIT WAS NOT TIMELY FILED.	1
II	THE PETITION FOR WRIT OF CERTIORARI DID NOT IN ANY EVENT STATE ANY REASON WHY THE CAUSE SHOULD BE REVIEWED BY THE COURT.	4
	EXHIBITS	

TABLE OF AUTHORITIES

		Page
1.	Federal Rules of Appellate Procedure:	
	Rule 40	3
2.	Federal Rules of Civil Procedure:	
	Rule 60(a)	6
3.	Rules of the Supreme Court of the United States:	
	Rule 17	4
	Rule 20.1	1
	Rule 20.2	1
2.	Title 28 U.S.C. § 2101(c).....	1

I

THE COURT DOES NOT HAVE JURISDICTION TO GRANT THE WRIT OF CERTIORARI ON THE GROUNDS THAT THE WRIT WAS NOT TIMELY FILED.

Rule 20 of the Rules of the Supreme Court of the United States deals with the time for petitioning. Rule 20.1 deals with the time for petitions for writ of certiorari to review judgments in criminal cases. Rule 20.2 provides as follows:

> A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

28 U.S.C. § 2101(c) provides as follows:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

No order extending the time for applying for writ of certiorari has been obtained and therefore in order to be timely filed, the order sought to be reviewed must have been entered on or after July 29,

1987. A review of the record shows that such is in fact not the case.

Initially, a review of the petition for certiorari and particularly the appendix thereto reveals that this is a petition seeking to review two orders of the United States Court of Appeals for the Ninth Circuit. The first order in Docket No. 85-2851 was entered on July 16, 1986 (Petitioner's Appendix, p.1). Thereafter the Petitioner filed a Petition for Rehearing. That petition for rehearing in Docket No. 85-2851 was denied by order entered September 29, 1986, a true copy of which is attached hereto and made a part hereof as Exhibit "A". Any petition for writ of certiorari to review this order would have to have been filed within ninety days of September 29, 1986. Clearly, it was not and therefore the petition is not timely as to the order entered in Docket No. 85-2851.

With regard to the order entered in Docket No. 85-1611, Petitioner's Appendix at page 4, indicates that that order was entered by the United States Court of Appeals for the Ninth Circuit on June 9,

1987. A petition for writ of certiorari should have been filed within ninety days of June 9, 1986 and this petition was not so filed. However, the time for filing a petition for writ of certiorari may be extended if a petition for rehearing is timely filed by any party in the case. If the petition for rehearing is timely filed, then the time for the filing of the petition for writ of certiorari runs from the date of the denial of rehearing.

In Case No. 85-1611, a petition for rehearing was filed and an order denying that petition for rehearing was entered on June 30, 1987, as shown at page 10 of Petitioner's Appendix. However, a review of the pleadings will show that the petition for rehearing filed in the United States Court of Appeals for the Ninth Circuit was not timely filed so as to toll the running of the time period for filing the instant writ.

Federal Rules of Appellant Procedure, Rule 40, deals with a petition for rehearing and states:

> A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule.
> . . . .

The order in this case was entered on June 9, 1987. The 14th day therefore would expire on June 23, 1987. Attached hereto and made a part hereof as Exhibit "B" is a copy of that petition for rehearing showing that it was filed on June 24, 1987. The petition for rehearing therefore was not timely and did not extend the time for filing the petition for writ of certiorari. Therefore, the 90-day period would have run from June 9, 1987 and would have expired long before the instant petition for writ of certiorari was filed.

Therefore, it is respectfully submitted that this Court should not consider the petition for writ of certiorari as it is jurisdictionally out of time.

II

THE PETITION FOR WRIT OF CERTIORARI DID NOT IN ANY EVENT STATE ANY REASON WHY THE CAUSE SHOULD BE REVIEWED BY THE COURT

Rule 17 of the Rules of the Supreme Court of the United States outlines considerations governing review on certiorari. The matters sought to be reviewed by the petitioner do not fit within any of the categories. There has been no showing that the

decisions sought to be reviewed are in conflict with the decisions of other federal courts of appeals on the same matter or in conflict with a state court of last resort on some federal question. The petition does not reveal or allege any gross departure from the accepted and usual course of judicial proceedings. The petition does not deal with a state court decision and the decisions sought to be reviewed do not deal with any important questions of federal law.

The writ filed by the petitioner is merely her attempt to once again advance the same positions which have always been decided against her by the United States District Court for the District of Nevada and the United States Court of Appeals for the Ninth Circuit.

The October 7th judgment was final and appealable. It contained an extensive opinion and thorough findings of fact and conclusions of law. The damages can be ascertained by referring to the opinion and the findings of fact and conclusions of law.

With regard to the review sought with respect to appeal Docket No. 85-1611, the Ninth Circuit found the District Court did not abuse its discretion in denying the Rule 60(a) motion. The petition for writ of certiorari shows no reason why this determination, that is the question of determination of abuse of discretion, should be reviewed by the United States Supreme Court.

It is therefore respectfully submitted that the writ for certiorari be denied.

Respectfully Submitted,

FRANK J. CREMEN, ESQ.
LAW OFFICES OF ALVARADO, RUS & McCLELLAN
LAW OFFICE OF WILLIAM L. McGIMSEY

By:_____
FRANK J. CREMEN, ESQ.
720 S. Fourth Street, #300
Las Vegas, NV 89101
Attorneys for Respondents, Elerding

10 11

FILED

SEP 29 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEELY SMITH, Plaintiff-Appellant, vs. INTERNATIONAL FUNDING CORPORATION, a California corporation, et al., Defendants-Appellees.	No. 85-2851 DC# CV-LV-79-111-LDG Nevada (Las Vegas) ORDER

Before: FLETCHER, NELSON and THOMPSON, Circuit Judges

Appellant's petition for rehearing is denied.

EXHIBIT "A"

A TRUE COPY
ATTEST 21 December 1987
CATHY A. CATTERSON
Clerk of Court
by: Barbara A. Alexander
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * *

FILED
JUN 24 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

KEELY SMITH,

Plaintiff/Appellant,

v.

INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; CHARLES E. ELERDING, JR., et al.,

Defendants/Appellees.

Case No. 85-1611

D.C. No.: CV-S-79-111, LDG
Nevada (Las Vegas)

JOHN AND ELIZABETH FOLEY
QUAIL PARK II - SUITE A1
801 SOUTH RANCHO
LAS VEGAS, NEVADA 89106
(702) 388-8900

APPELLANT'S PETITION FOR REHEARING

This Court in entering its Memorandum Opinion June 9th, 1987, overlooks the fact that Plaintiff/Appellant has been unable to secure an interpretation of how much money Plaintiff/Appellant owes even assuming Judge Claiborne's Decision of October 6th, 1983 is final. An examination of Judge Claiborne's Judgment, Findings of Fact, Conclusions of Law and Decision do not reveal the amount Judge Claiborne felt was owing. The Orders entered by Judge Lloyd D. George do not deal with the amount of money owing. The following Orders of this Court do not reveal the amount due and owing. Attached hereto as Exhibit 1 is the Order of this Court filed May 22, 1984 by Judge Choy, Judge Goodwin and Judge Pregerson in case 84-1565; the Order by Judge Choy, Judge Goodwin and Judge Pregerson

EXHIBIT "B"

entered June 26th, 1984 in 84-1565, which is attached hereto as Exhibit 2; the Order of Judge Snead in Case 85-1611 entered August 8th, 1985 which is attached hereto as Exhibit 3; the Order of Judge Fletcher, Judge Nelson and Judge Thompson in Case 85-2851 entered July 16th, 1986 which is attached hereto as Exhibit 4; the Order of Judge Fletcher, Judge Nelson and Judge Thompson in Case 85-2851 entered September 29th, 1986 which is attached hereto as Exhibit 5; the Order of Judge Skopil, Judge Farris and Judge O'Scannlain in Case 85-1611 entered May 7th, 1987 which is attached hereto as Exhibit 6; and the Order of Judge Skopil, Judge Farris and Judge O'Scannlain in Case 85-166 entered June 9th, 1987, which is attached hereto as Exhibit 7.

The Respondent Elerding is now claiming $567,148.76 is due and seeks to foreclose for said sum. In November, 1983, Elerding asserted the amount due as of March 2, 1979 was $202,263.00, and $297,270.43 on November 13, 1983.

If Plaintiff/Appellant is required to pay 10% as ordered by Judge Claiborne on the amounts actually received by her, the amount would have been $158,780.61 as of March 2, 1979, eight years interest at 10% on that sum equals $127,024.48, equals $285,805.09 minus $35,000.00 paid equals $250,805.09.

This illustrates why one of the reasons Plaintiff/Appellant is fighting so hard to be relieved of a very unjust

...

...

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 EXHIBIT "B"

situation arising out of a technicality and the issue of the amount due should be dealt with by this Court.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF JOHN & ELIZABETH FOLEY

BY: _____
JOHN P. FOLEY, ESQ.
601 So. Rancho, Suite A1
Las Vegas, Nevada 89106
Attorney for Plaintiff/
Appellant

RECEIPT OF A COPY of the foregoing Petition for Re-hearing is hereby acknowledged this 3rd day of June, 1987.

BY: WILLIAM L. McGIMSEY
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 EXHIBIT "B"